83-519

No.

In the Supreme Court of the United States

October Term, 1983

THE NATIONAL CASH REGISTER CORPORATION,
Defendant-Appellant,
Petitioner,

vs.

JOHN W. ROSE,
Plaintiff-Appellee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. What is the proper measure of damages under the Age Discrimination in Employment Act of 1967 to which an unlawfully terminated employee is entitled due to the cessation of the employee's insurance benefits previously paid by his employer?
2. Does the Age Discrimination in Employment Act of 1967 incorporate Section 11 of the Portal-to-Portal Act of 1947?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The National Cash Register Corporation prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals (App. A hereto) is reported at 703 F.2d 225 (1983).

JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals was issued on March 31, 1983. A timely petition for rehearing was denied on June 3, 1983. This petition is filed within 90 days of the denial of the petition for rehearing. This court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The pertinent parts of § 16 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 626), § 11 of the Portal-to-Portal Act of 1947 (29 U.S.C. § 260), and § 7 of the Fair Labor Standards Act, as amended (29 U.S.C. § 216), are set forth in Appendices F, G, H and I hereto.

STATEMENT OF THE CASE

This case arises from an age discrimination in employment action filed under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, by John W. Rose ("Rose") against the National Cash Register Corporation ("NCR") on January 17, 1977. Rose was born January 22, 1922 and was hired by NCR as a salesman in its New York office in January, 1942. After two prior transfers Rose was moved to Grand Rapids, Michigan in March of 1972 and assumed duties as sales manager of a five man sales team. In 1974 Rose was demoted to a salesman position. He was terminated by NCR in June, 1976 at the age of fifty-four.

During the years 1969-1976, NCR set annual sales quotas as one of the job requirements for its sales force. All account managers (salesmen), including Rose, were assigned a minimum quota based on their level of experience and base salary. Rose performed below sales quota as department manager in Schenectedy, New York in 1969, 1970 and 1971 and below sales quota as Grand Rapids department manager in 1972 and 1973. In both 1974 and 1975 Rose failed to make his sales quota despite the fact that he had been assigned NCR's minimum quota for an account manager.

On January 3, 1975, Rose's supervisor sent him a letter reviewing and evaluating his productivity during the year 1974. It stated that Rose had attained only 61% of his annual sales quota which ranked him with the lowest salesman in the midwest region. On January 15, 1975, the regional supervisor wrote to Rose confirming an understanding reached between them that attaining 100% of sales quota was the minimum acceptable level of performance. Despite a reorganization of sales accounts which nearly doubled Rose's accounts in February of 1975, Rose showed a continued inability during that year to attain quota.

On August 15, 1975, Rose's supervisor wrote another warning letter to Rose indicating that if he was not at quota pace by September 15, 1975 he would be automatically terminated. On September 15, 1975, Rose was not on quota pace and on September 23, 1975, his supervisor wrote to him indicating that due to his failure to make quota Rose was on probationary and temporary status until the matter had been discussed with the regional supervisor. In a letter written later that autumn Rose's supervisor informed Rose that if Rose was not on quota for that year it would be his job to give him a 90 day notice to seek other employment.

Rose failed to reach quota pace during the remainder of 1975 and achieved quota in only one of the first six months of 1976. In June of 1976 his supervisor determined that Rose showed no sign of increasing his sales productivity and by letter of June 4, 1976 Rose was terminated from his employment with NCR. At the time the decision was made to terminate Rose, both his district supervisor and his regional supervisor were themselves over 50 years old.

A jury trial was conducted October 29 through 31, November 4 through 7, and November 10, 1980. At the close of Rose's case in chief, NCR moved for a directed verdict. The motion was denied. At the end of trial NCR again moved for a directed verdict. That motion was also denied.

The jury rendered a verdict that NCR had violated the ADEA and returned a special verdict awarding Rose $25,200.00 in lost wages and $20,650.00 in lost fringe benefits. It also found that NCR's violation of the ADEA had been willful. By Judgment dated November 18, 1980, the court awarded $25,200.00 in lost wages, $20,650.00 in lost fringe benefits, $45,850.00 as liquidated damages, together with prejudgment interest on the entire sum.

On November 28, 1980 NCR filed a Motion for Judgment Notwithstanding the Verdict, New Trial and/or to Alter or Amend Judgment. In its brief in support of this motion NCR argued that the court should have considered and determined whether NCR had exhibited any "good faith" in its termination of Rose. The court refused to independently determine the good faith issue and NCR's motion was denied by Order entered April 3, 1981. On April 14, 1981 NCR filed a timely Notice of Appeal to the Sixth Circuit Court of Appeals. That appeal was argued on December 2, 1982, decided on March 31, 1983, and is reported as *Rose v. National Cash Register Corporation*, 703 F.2d 225 (6th Cir. 1983). NCR filed a timely Petition for Rehearing with the Sixth Circuit Court of Appeals. The Petition for Rehearing was denied on June 3, 1983.

REASONS FOR GRANTING THE WRIT

This case presents for decision two important questions regarding the proper award of damages in cases brought under the Age Discrimination in Employment Act. Each of these questions has widespread significance beyond this case. Both issues are the subject of conflicting decisions by the circuit courts of appeals and other federal courts and agencies. Prompt and definitive resolution of both issues is needed for the orderly administration of justice and to resolve the currently existing conflicts. Unless this Court reviews these issues and provides authoritative guidance, important questions of law will remain in dispute and uncertain.

I. REVIEW BY THIS COURT IS NECESSARY TO ESTABLISH THE PROPER MEASURE OF DAMAGES TO WHICH AN UNLAWFULLY TERMINATED EMPLOYEE IS ENTITLED DUE TO CESSATION OF THE EMPLOYEE'S INSURANCE BENEFITS.

Plaintiff John W. Rose ("Rose") claimed damages at trial for the "loss" of certain fringe benefits he enjoyed while employed by Defendant, National Cash Register Corporation ("NCR"). Among those "lost" fringe benefits were health insurance, short and long term disability insurance, and term life insurance.

The evidence at trial indicated that between the time he was terminated by NCR and the date of trial, Rose incurred no out-of-pocket pecuniary loss due to the termination of those particular benefits. He neither (1) purchased any replacement insurance coverages nor (2) had any reimbursable medical expenditures, disability losses, or death benefit losses. In this latter regard, Rose

experienced no hospitalization, no medical treatment, no disability and did not die after he was terminated by NCR. Therefore, because he did not pay any monies to purchase replacement insurance coverage and further did not have instances where he (or his estate) would have received money as a result of the coverages which were maintained for him by NCR while he was an employee, Rose completely failed at trial to prove that he had any out-of-pocket losses.

Significantly, to attach a dollar figure to his claimed damages, Rose called as a witness at trial an insurance expert who estimated the *replacement* cost of all those insurance benefits which NCR maintained for Rose during his employment. Despite NCR's submission of a proposed jury instruction limiting fringe benefit damages to out-of-pocket losses, the court rejected the out-of-pocket approach and instructed the jury to include in any damage award the *value* of fringe benefits provided to Rose by NCR.[1]

NCR raised the question of the award of damages for terminated fringe benefits as one of the issues in its appeal to the Sixth Circuit Court of Appeals. The Court of Appeals rejected NCR's "out-of-pocket" argument and upheld the district court's charge without comment. *Rose v. National Cash Register Corp.*, 703 F.2d 225 (6th Cir. 1983).

Statutory and case law pertaining to employment discrimination has evolved rapidly over the past 18 years since enactment of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The volume of litigation in this area is ever-expanding. The issue of damages for the loss of fringe benefits as a result of wrongful termination is an important matter of public policy requiring guidance from

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1. NCR objected to the jury instruction actually given.

this Court. Cases at various judicial levels across the country evidence a myriad of inconsistent approaches to this issue. With the rendering of its opinion in this case, the Sixth Circuit has created a distinct split of opinion among the circuits directly contradicting the rule of damages followed by the Fifth and Seventh Circuits as will hereafter be set forth.

This Court has consistently followed the long-established fundamental principle of contract law that the award of damages is intended to restore an aggrieved party to the same economic position he would have occupied absent a defendant's wrongful conduct. This rule has been found to be equally applicable to prevailing plaintiffs in discrimination actions.[2] Review by this Court of the damage issue of fringe benefits in discrimination litigation is required to resolve the split of opinion among the circuits as well as the inconsistent approaches to the issue taken by other judicial bodies. It is necessary that this Court definitively and authoritatively set forth the standard of damages for loss of fringe benefits by a terminated employee consistent with the fundamental principle of damages to make aggrieved plaintiffs "whole" and not provide them with a "windfall."

Decisions concerning damages for loss of fringe benefits following wrongful termination fall generally into two categories. They are: the valuation approach and the out-of-pocket approach.

A. Valuation Approach.

A minority of district courts have assessed a "value" to the terminated insurance coverage which can be awarded

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2. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977); and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

to the aggrieved discharged employee regardless of any actual financial losses. The district court in this case instructed the jury to calculate damages for loss of fringe benefits incurred by Rose at the amount it *would have cost Rose to replace* the insurance he maintained while an employee at NCR. This instruction was given despite the fact that Rose neither (1) purchased replacement insurance nor (2) had any reimbursable medical expenses, disability losses, or death benefit losses which would have been covered under the insurance maintained for him by NCR while he was an employee. There are no reported cases which support the district court's decision allowing a wrongfully terminated employee to recover as damages the amount it would have *cost the employee* to replace his insurance benefits.

There are two district courts which have allowed recovery by the employee for lost insurance benefits despite the fact that the employee neither purchased replacement insurance nor incurred medical expenses. *Vant Hul v. City of Dell Rapids*, 462 F. Supp. 828 (D. S.D. 1978); *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971). Both of those cases, however, varied from the district court's opinion in this case in that rather than awarding the plaintiff the replacement cost of the lost insurance, they awarded the amount the *plaintiff's employer would have contributed* to the employee's insurance plan.

B. Out-of-Pocket Approach.

The majority of reported cases have adopted the out-of-pocket approach for damages suffered as a result of lost fringe benefits. The courts which have followed this approach allowed only reimbursement to the employee of expenses incurred and not the "value" of the coverage.

1. Circuit Decisions.

The court of appeals in this case, by upholding without opinion the district court's instruction regarding fringe benefits, has created a conflict of law within the circuit courts. This Sixth Circuit's upholding of the replacement cost approach to damages is in direct conflict with two circuits which have upheld decisions not to award any damages where no replacement insurance was purchased by the employee. *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981); *Merriweather v. Hercules Inc.*, 631 F.2d 1161 (5th Cir. 1980).[3]

2. District Decisions.

Numerous approaches to the fringe benefit damage issue have been utilized by the district courts. In *Robb v. Chemetron Corp.*, 17 Fair Empl. Prac. Cas. (BNA) 1535 (S.D. Tex. 1978), and *Pedreyra v. Cornell Prescription Pharmacies Inc.*, 465 F. Supp. 936 (D.C. Colo. 1979), the plaintiff was awarded the costs actually incurred in replacing insurance coverage which was lost following wrongful termination.[4]

Courts in two districts have awarded the plaintiff both the costs expended in purchasing replacement insurance and certain medical expenses incurred which were not covered by the replacement plan but would have been covered under the plan provided by the employer. *Equal Employment Opportunity Commission v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919 (S.D. N.Y. 1976); *Spagnuolo v.*

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3. Neither *Syvock* nor *Merriweather* gives any indication as to whether or not the plaintiff incurred any medical expenses following his termination.

4. In *Robb* and *Pedreyra* it was not indicated whether the plaintiff had actually incurred any costs for medical services which were not covered under the plaintiff's replacement insurance but were covered under the prior insurance coverage with plaintiff's former employer.

Whirlpool Corp., 550 F. Supp. 432 (W.D. N.C. 1982). The formula utilized by the court in *Spagnuolo* was as follows:

> Costs actually incurred to acquire comparable coverage, plus any payments which would have been made under the Whirlpool plan but were not made under plaintiff's substitute coverage, minus the cost of the Whirlpool coverage to employees such as plaintiff.
>
> 550 F. Supp. at 434.

In addition to seeking damages for lost medical coverage, the plaintiff in *Spagnuolo* also sought damages for termination of his life insurance policy with the employer. However, the plaintiff did not replace his life insurance coverage nor did his estate have any claims under the policy. As a result, the court held that no damages were recoverable.[5]

The Federal District Court for the Eastern District of Michigan has reached a holding regarding damages for fringe benefits similar to the court in *Spagnuolo*, which is in direct opposition to the holding of the District Court for the Western District of Michigan in this case. In *Pitts v. Frito-Lay, Inc.*, 523 F. Supp. 7 (E.D. Mich. 1980),[6] the court adopted the out-of-pocket/make whole remedy uti-

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5. The court did, however, recognize that until the plaintiff was reinstated the defendant was obligated to provide the same protection to the plaintiff for both life insurance and medical insurance as though he were still continuing in his employment. It stated, "Whirlpool may satisfy this obligation in any way it wishes, as long as it does so completely and responsibly. Where insurance is involved, Whirlpool may include plaintiff in the various plans, set up a separate fund to cover him, bear the risks itself (assuming the corporation remains solvent), or devise any other method to guarantee that plaintiff will be indemnified for losses as fully as if Whirlpool had not undertaken to discriminate against him." *Id.* at 433.

6. *Pitts* involved a breach of employment contract claim against an employer and or breach of duty of fair representation claim against the employee's union. The court's reasoning on the proper measure of damages is equally applicable to ADEA actions.

lized in *Spagnuolo*, and refused to award any damages due to the fact the plaintiff had neither purchased replacement insurance nor suffered any medical losses. The court held:

> I am persuaded that the better approach to evaluation of fringe benefits as elements of damages is to look to the economic loss sustained by the mistreated employee. This is in keeping with the policy of offering a "make whole" remedy and avoiding punitive damages. . . . Moreover, it fits logically into a scheme by which an employer would be liable, for example, to compensate a wrongfully discharged employee for high medical expenses incurred while without work and without private insurance. . . . The other side of the case just hypothesized is presented by the facts of the case at bar. Here, the Plaintiff identifies no area in which he suffered economic injury by the loss of fringe benefits but rather contends a general right to recover them.
>
> While it might be submitted that the employer is, in effect, reaping a benefit from the discharge since it has avoided payments in the amount of the finge benefits and thereby has not been forced to pay out all that would have been spent had the employee been properly retained as an employee during the period in question, it is not correct to conclude that the ruling the Court reaches will undermine the deterrent effects of compensatory damages. There is no way to know, when making a personnel decision, whether the employee will suffer injury during the employment hiatus and might, under the rationale here developed, thereby create a great liability for the employer.
>
> Accordingly, Plaintiff will be permitted to recover only those damages actually suffered, not hypothetical de-

> privations. In concluding on this issue, it might be noted that the dicta in this ruling amounts to a creation of insurance protection for the improperly discharged or laid off employee—the guilty employer becomes the insurer. . . .
>
> 523 F. Supp. at 9-10.

It should be noted that one court has limited the out-of-pocket approach strictly to the cost of replacement insurance. In *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706 (E.D. Wis. 1978), the plaintiff did not purchase replacement insurance but did incur medical costs. Nevertheless, the court refused to order damages because the plaintiff had not made expenditures for replacement of the policy which the plaintiff lost when he was wrongfully terminated.

Without specifically addressing the out-of-pocket make whole approach, two districts have awarded the plaintiff damages for uninsured medical costs incurred by the plaintiff following termination. *Brunetti v. Wal-Mart Stores*, 525 F. Supp. 1363 (E.D. Ark. 1981); *Willett v. Emory & Henry College*, 427 F. Supp. 631 (W.D. Va. 1977). Both cases therefore made the employer the *de facto* insurer of the plaintiff after wrongful termination when the plaintiff did not purchase replacement insurance.

3. National Labor Relations Board Decisions.

The opinions of the National Labor Relations Board have also evidenced the out-of-pocket/make whole approach to the award of damages. In *Deena Artware, Inc.*, 112 N.L.R.B. 371 (1955), the plaintiff was awarded damages for the medical expenses incurred while the plaintiff remained uninsured following termination. In *The Madison Courier, Inc.*, 180 N.L.R.B. 781 (1970), *aff'd in part*, 472 F.2d 1307 (D.C. Cir. 1972), the plaintiffs were reimbursed for the

costs expended in purchased replacement insurance. Finally in *M.J. McCarthy Motor Sales Co.*, 147 N.L.R.B. 605 (1964), the plaintiff was awarded the cost of replacement insurance together with medical expenses incurred by the plaintiff which were not covered by the replacement insurance but would have been recoverable under the previous insurance through the employer minus the amount of premium contribution which would have been required of the plaintiff as part of the employer's insurance plan.[7]

There currently exist conflicting opinions and an absence of authoritative standards regarding the fringe benefit damage issue in discrimination cases. Included in that uncertainty is a direct split of opinion among the Fifth, Sixth and Seventh Circuit Courts. As previously indicated, the Fifth and Seventh Circuits have adopted the "make whole" approach to damages while the Sixth Circuit, by affirming without opinion the District Court's ruling in this case, has adopted a "windfall" approach. Other judicial opinions and those of the National Labor Relations Board evidence a variety of inconsistent decisions in this area. It is important that this Court review this case and authoritatively set forth a standard to be used in determining damages consistent with the principles laid down by this

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7. The Board in *McCarthy* recognized the difficulty in adopting any damage approach to the loss of insurance benefits other than the out-of-pocket approach. It stated, "Admittedly the value of insurance benefits presents problems of computation. Where employees have lost insurance benefits (coverage) there is a *value* to the *loss of protection* even where the *actual* necessity of protection does not arise. The determination of the value under such circumstances involves many intangibles. For this reason I believe a policy of limiting the determination of the measure of the value of such benefits to the instances of measurable monetary loss is wise. Accordingly I compute the value of Pechtold's loss in wages, resulting from the loss in insurance coverage to be the amount of the hospital bills he had to pay for his wife plus the premiums he paid for attempted various coverage, less the premiums he would have paid had he continued to work at the Respondent during the backpay period." *Id.* at 613 (emphasis in original).

and other courts whereby a plaintiff is put in the same economic position he would have been in absent the defendant's wrongful conduct and is not permitted to achieve a "windfall."

II. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE CONFLICTING JUDICIAL OPINIONS ON WHETHER THE ADEA INCORPORATES SECTION 260 OF THE PORTAL-TO-PORTAL ACT OF 1947.

On appeal to the Sixth Circuit, Defendant NCR raised the issue of whether the trial court, pursuant to § 11 of the Portal-to-Portal Act of 1947 ("PPA"), should have made an independent determination regarding the award of liquidated damages to the Plaintiff. After the jury determined that NCR's violation of the ADEA had been willful, the trial court awarded the Plaintiff liquidated damages in an amount equal to the amount awarded for lost wages and lost fringe benefits. Section 11 of the PPA gives the trial court discretion to deny or limit the award of liquidated damages in a Fair Labor Standards Act ("FLSA") action if the defendant establishes a "good faith" defense. 29 U.S.C. § 260. NCR argued that § 11 of the PPA was incorporated into the ADEA and that the trial court therefore should have made an independent determination of whether NCR acted in good faith in discharging Rose. The trial court declined to independently consider NCR's "good faith" in awarding liquidated damages.

The Sixth Circuit rejected NCR's position, holding that § 11 of the PPA is inapplicable to actions instituted pursuant to the ADEA. 703 F.2d at 230. The Court's holding was expressly based on dicta regarding § 11 in *Lorillard v. Pons*, 434 U.S. 575, 581-82 n.8 (1978), as well as decisions in some of the circuits. The Fifth Circuit,

however, has explicitly ruled that § 11 of the PPA is incorporated into the ADEA and that, as a result, the court in an ADEA suit properly has discretion to consider whether the plaintiff is entitled to liquidated damages.[8] Other circuits have held or assumed that § 11 of the PPA is not incorporated into the ADEA.[9] This Court should grant certiorari to explain its dicta in the *Lorillard* case and to resolve the conflict between the circuits on whether Congress intended to incorporate § 11 of the PPA into the ADEA.

A. The Relevant Statutes.

The remedies available to a successful plaintiff in an ADEA action are set forth in § 7(b) of the Act, which states in pertinent part:

> The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, *as amended* (29 U.S.C. 211(b), 216, 217) and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, *as amended* (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes

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8. *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981); *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1312 (5th Cir. 1976).

9. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154 n.4 (7th Cir. 1981); *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129-130 (2nd Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 982 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 279 (3rd Cir. 1980); and *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979).

> of sections 16 and 17 of the Fair Labor Standards Act of 1938, *as amended* (29 U.S.C. 216, 217): *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act.
>
> 81 Stat. 604 (Emphasis added).

When the ADEA was codified, the words "as amended" were deleted. *See* 29 U.S.C. § 626(b). This codification has not been enacted into positive law by Congress and therefore the language of the Statute at Large prevails. 1 U.S.C. § 204(a); *United States v. Welden,* 377 U.S. 95, 98-99 n.4 (1964).

Under the FLSA, once a violation of the Act is established, § 16 provides for an award of liquidated damages in an amount equal to the amount of unpaid wages:

> Any employer who violates the provisions of Section 206 or Section 207 of this Title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages.
>
> 29 U.S.C. § 216.

In 1947, Congress modified the effect of § 16 of the FLSA, which mandated an automatic doubling of damages, by the passage of the Portal-to-Portal Act ("PPA"). The preamble of the PPA clearly states that Congress intended the Act to generally correct some existing problems with the interpretation of the FLSA and, more particularly, to relieve the harshness of its automatic liquidated damage provision.[10] Congress specifically addressed the concerns

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10. The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts

(Continued on following page)

regarding liquidated damages in § 11 of the PPA, which provides as follows:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, *if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation* of the Fair Labor Standards Act of 1938, as amended, *the court may, in its sound discretion, award no liquidated damage or award any amount thereof not to exceed the amount specified* in Section 216 of this Title.
>
> 29 U.S.C. § 260. (Emphasis added).

In summary, the ADEA incorporated § 16 of the FLSA "as amended." Section 11 of the PPA amended § 16 of the FLSA to preclude liquidated damages where the court finds good faith.

Footnote continued—

> between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees . . . (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; . . .
>
> 29 U.S.C. § 251.

B. Circuit Court Opinions on the Incorporation of Section 11 of the Portal-to-Portal Act in the ADEA.

With the exception of the Sixth Circuit in the instant case, the only court that has discussed the incorporation issue in light of the "as amended" language of the Statute at Large version of the ADEA is the Fifth Circuit in *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976). The trial court in that case awarded liquidated damages to the plaintiff because it found that the employer's violation of the ADEA was willful. However, the trial court noted that if § 11 of the Portal-to-Portal Act was applicable, it would not have awarded liquidated damages because there was no evidence of bad faith on the part of the employer. *Id.* at 1309. The Fifth Circuit reversed, holding that trial courts have the discretion under the ADEA to deny liquidated damages awards because § 11 of the PPA constituted an amendment to the FLSA, and was therefore incorporated into the ADEA. The court reached this holding by carefully considering both the language of the statute and its legislative history:

> Even though Section 11 [of the PPA] did not specifically refer to subsection 16(b) of the FLSA, it clearly constituted an amendment thereto. . . .
>
> Subsection 7(b) of the ADEA plainly states that the provisions of the ADEA shall be enforced in accordance with the remedies provided in Section 16 of the FLSA, *as amended*. The words "as amended" are unambiguous and should be interpreted according to their plain meaning. . . . There is nothing in the ADEA or its legislative history suggesting that subsection 7(b) be interpreted to read out the amendment

of the FLSA by the PPA. On the contrary Senator Javits, who, along with Senator Yarborough, the floor manager of the bill which became the ADEA (S. 830), cosponsored the particular amendment which provided for enforcement techniques (including remedies) under the FLSA, stated in a colloquy with Senator Yarborough (113 Cong. Rec. 31254 (1967)):

> The enforcement techniques provided by S. 830 are directly analogous to those available under the Fair Labor Standards Act; in fact, S. 830 incorporates by reference, *to the greatest extent possible*, the provisions of the Fair Labor Standards Act. [Emphasis supplied.]

Id. at 1311 (citations deleted).

The court did not find a conflict between the incorporation of § 11 and § 7(b) of the ADEA, which states that liquidated damages shall be payable only in cases of willful violations. The court stated "we do not construe this to mean that they shall *always* be payable if there is a willful violation, regardless of the good faith of the employer." *Id.*

Two years after *Hays*, the Supreme Court in *Lorillard v. Pons*, 434 U.S. 575 (1978), engaged in a brief discussion of the interrelationship between § 11 of the PPA and the ADEA.[11] In order to determine whether Congress in-

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11. *Id.* at 580-82. The court in *Lorillard* held that a plaintiff has a right to a jury trial in civil actions for lost wages under the ADEA. *Id.* at 585. The Court's holding was based in part on Congress' intent that the ADEA be enforced in accordance with the "powers, remedies, and procedures" of the FLSA. *Id.* at 580. It was already well-established that jury trials were available in private actions pursuant to the FLSA, and the court reasoned that where Congress adopts a new law incorporating sections of a prior law, it is presumed to have had knowledge of the interpretation given to the incorporated law. *Id.* at 580-81.

tended that plaintiffs be entitled to a jury trial in ADEA lawsuits, the Court analyzed the ADEA's incorporation of the remedial provisions of the FLSA. As an example of a change Congress made to the FLSA procedures under the ADEA, the Court stated "while incorporating into the ADEA the FLSA provisions authorizing awards of liquidated damages, Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful." *Id.* at 581. In an explanatory footnote to that statement, the Court further stated:

> By its terms, 29 U.S.C. § 216(b) requires that liquidated damages be awarded as a matter of right for violations of the FLSA. However, in response to its dissatisfaction with that judicial interpretation of the provision, Congress enacted the Portal-to-Portal Pay Act of 1947, 61 Stat. 84, which, *inter alia,* grants courts authority to deny or limit liquidated damages where the "employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of" the FSLA, § 11, 29 U.S.C. § 260 (1970 ed., Supp. V). Although Section 7(e) of the ADEA, 29 U.S.C. § 626(e), expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act, 29 U.S.C. §§ 255 and 259 (1970 ed., and Supp. V), the ADEA does not make any reference to § 11, 29 U.S.C. § 260 (1970 ed., Supp. V).
>
> *Id.* at 581-82 n.8.

The Court then went on to state:

> This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA

> practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA. Senator Javits, one of the floor managers of the bill, so indicated in describing the enforcement section which became part of the Act: "the enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]."
>
> *Id.* at 582 (citation deleted).

The Supreme Court did not hold that § 11 was *not* incorporated into the ADEA. That issue was not before the Court. The Court's comments regarding § 11 were clearly dicta and only included for the purpose of drawing an analogy. The Court did not refer to the *Hays* decision, which was the only circuit court case on point at that date. Importantly, the Court, unlike the Fifth Circuit in *Hays*, evidently did not consider the official version of the ADEA but, instead, cited the United States Code version. As noted earlier, the United States Code version of § 7 of the ADEA does not state that the provisions of the ADEA shall be enforced in accordance with the powers, remedies and procedures of the FLSA *as amended* or that amounts owing as a result of a violation of the ADEA shall be deemed to be unpaid wages for purposes of § 16 of the FLSA *as amended*. Therefore, the Supreme Court in *Lorillard* relied on an inaccurate codification of the ADEA in its dicta.

After the *Lorillard* decision, several circuit courts have rejected the *Hays* approach and followed the implication of the Supreme Court's dicta in the *Lorillard* case that § 11 of the PPA was not incorporated in the ADEA. However, the Fifth Circuit, after *Lorillard*, reaffirmed its

Hays holding in *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1095-96 (5th Cir. 1981). The First Circuit was the first Circuit to address the issue after *Lorillard*. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). As the sole support for its holding that Congress did not intend to graft § 11 of the PPA onto the ADEA, the *Loeb* court cited footnote 8 of the Supreme Court's Opinion in *Lorillard*. *Id.* at 1020. The First Circuit also used the codified version of the ADEA and therefore did not have the benefit of the "as amended" reference. However, the court did recognize that the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, which "have been amended by Section 11 of the Portal-to-Portal Pay Act . . . ." *Id.* Given that the First Circuit in *Loeb* specifically recognized that § 16 of the FLSA was *amended* by § 11 of the PPA, it could well have ruled differently had it not relied on the codification of the ADEA which deleted the phrase "as amended" after referencing §§ 16 and 17.

In *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3rd Cir. 1980), the Third Circuit reviewed an award of liquidated damages where the trial court had automatically awarded them based on a jury determination that the defendant's violation of the ADEA was willful. The defendant argued on appeal that the trial court, pursuant to § 11 of the PPA, should have determined whether the employer in good faith believed that it had a legitimate reason to discharge the plaintiff, notwithstanding the jury finding of age discrimination. Without engaging in any independent analysis of the incorporation issue, the appellate court rejected the defendant's position based on the rationale of the First Circuit in *Loeb*. *Id.* at 279.

The Ninth Circuit, in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981) also relied on the reason-

ing of the First Circuit in *Loeb* in holding that the good faith defense to a liquidated damages recovery is inapplicable in ADEA actions. *Id.* at 981-82. The court also expressly relied on the dicta contained in *Lorillard*, which it found to be persuasive support for the *Loeb* decision. *Id.* In *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2nd Cir. 1981), the Second Circuit also rejected a defendant's contention that § 7(b) of the ADEA, by incorporating FLSA procedures, also incorporates § 11 of the Portal-to-Portal Act. *Id.* at 129. The court implied that it reached this result because the other three circuits which had considered the same claim after the Supreme Court's Opinion in *Lorillard* all interpreted the Supreme Court's dicta to require such a result. *Id.* at 129-130.

Without expressly deciding the issue, the Seventh Circuit in *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981), stated that "the weight of authority is that no 'good faith' showing, as such, by the employer is required under the ADEA." *Id.* at 154 n.4 (citing *Kelly*, *Wehr*, *Loeb* and *Hays*).

Finally, in *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980), the Tenth Circuit refused to decide the issue of whether § 11 of the PPA was intended by Congress to have been incorporated into § 7 of the ADEA because the evidence did not support a good faith defense. *Id.* at 595 n.4.

Of all of the circuit courts that have considered the issue, only the Fifth Circuit in *Hays* and the First Circuit in *Loeb* have thoroughly considered and analyzed the issue. The *Hays* court relied on the legislative history of the Portal-to-Portal Act and the Age Discrimination in Employment Act and the language of the ADEA as enacted, rather than as codified, in finding that the trial court does have discretion in awarding liquidated damages. On

the other hand, the *Loeb* court analyzed the issue based upon the dicta in *Lorillard* and the codified version of the ADEA. In actuality, the other circuits have merely followed the analysis of the First Circuit in *Loeb*. Therefore, the Supreme Court should review the issue and determine what Congress intended by incorporating the remedy provisions of the FLSA, as amended, into § 7 of the ADEA. The Supreme Court did not focus on this language in its discussion in *Lorillard*. The Fifth Circuit in *Hays*, with reference to the "as amended" language, stated that the words "are unambiguous and should be interpreted to their plain meaning." 531 F.2d at 1311. It then found that although "Section 11 [of the PPA] did not specifically refer to subsection 16(b) of the FLSA, it clearly constituted an amendment thereto." *Id.* The Sixth Circuit in the instant case reasoned that a "common sense construction" of § 7(b) of the ADEA "indicates that the words 'as amended' merely refer to internal amendments of §§ 16 and 17 [of the FLSA] . . . rather than separate provisions of Title 29 which simply have an effect on the operation of §§ 16 and 17." 703 F.2d at 230. Obviously, what the Fifth Circuit sees "clearly" does not square with the Sixth Circuit's "common sense."

The Supreme Court should resolve this conflict between the Fifth and Sixth Circuits by considering the congressional intent behind § 7 of the ADEA. The central issue to be resolved is whether Congress intended the willful provision of § 7(b) of the ADEA to be supplemented by § 11, or to replace § 11.

The legislative history reveals that Congress intended to incorporate the enforcement provisions of the FLSA *to the greatest extent possible* into the ADEA. This intent is reflected in the comment of Senator Javits that "the enforcement techniques provided by S. 830 are directly analogous to those available under the Fair Labor Stan-

dards Act; in fact, S. 830 incorporates by reference, *to the greatest extent possible*, the provisions of the Fair Labor Standards Act." 113 Cong. Rec. 31254 (1967) (emphasis added).

Later legislative history relating to the 1978 amendments reveals that Congress did intend that the jury in an ADEA action at least make an initial determination regarding whether to award liquidated damages. After the Supreme Court in *Lorillard* held that an ADEA plaintiff was entitled to a jury trial on a lost wage claim, Congress amended the ADEA to provide for a "trial by jury on any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, . . ." Age Discrimination in Employment Act Amendments of 1978 § 4(a)(2), 92 Stat. 190 (1978). With reference to that amendment, the House Report explaining the amendments stated that because "liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury." H. Conf. Rep. No. 95-950, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 535. Therefore, it is clear that Congress intended that the jury be the fact-finder on the issue of whether the violation of the ADEA was "willful." However, there is no legislative history that reveals whether Congress intended that the trial court then review the evidence to determine whether the violation, although willful, was committed in good faith.[12] If Congress

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12. There is a dispute among the Circuits as to whether a "willful" violation could ever be made in "good faith" because each circuit uses a different definition of "willful." The Third Circuit has defined "willful" as action that is "deliberate, intentional and knowing" or action that is taken "in reckless disregard of the consequences." *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3rd Cir. 1980). The Ninth Circuit, in *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 n.7 (9th Cir. 1981), adopted the *Wehr* definition except as it defined willfulness as equiva-

(Continued on following page)

had intended to remove this discretion from courts in ADEA actions, it is logical that the ADEA would expressly exclude it in light of the congressional intent to include the remedial provisions of the FLSA "to the greatest extent possible." In addition, if Congress had intended to change the effect that § 11 of the PPA has on the operation of §§ 16 and 17 of the FLSA,[13] it would have put an express exclusion into § 7 of the ADEA, rather than simply incorporating §§ 16 and 17. As the Supreme Court stated in *Lorillard*, Congress is assumed to understand the operation of an existing statute when it incorporates it into a new statute. Surely, it must be assumed that Congress was aware at the time it passed the ADEA that the automatic award of liquidated damages under § 16 of the FLSA had been rendered discretionary by the passage of § 11 of the PPA. If Congress intended § 16 of the FLSA to operate differently in ADEA actions, it would have drafted the statute to express that intent. That Congress did not do.

Footnote continued—

lent to recklessness. In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit quoted approvingly a definition that stated that an act is done "willfully" if done "voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." *Id.* at 1020 n.27 (quoting E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions*, § 14.06, at 384 (3d ed. 1977)). In *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981), the Seventh Circuit recognized that several of the definitions used by other circuit courts would lead to an automatic award of liquidated damages in many ADEA cases, which Congress had not intended. Therefore, the court held that in order to establish a willful violation, "a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA." *Id.* at 155-56. The district court in the instant case gave a jury instruction consistent with the approaches of the First and Seventh Circuits.

13. The Sixth Circuit in the present case stated that § 11 of the PPA had an effect on the operation of § 16 of the FLSA, rather than actually amending it. 703 F.2d at 230.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 81-1245

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN W. ROSE,
Plaintiff-Appellee,

v.

THE NATIONAL CASH REGISTER CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Michigan.

Decided and Filed March 31, 1983

Before: MARTIN and KRUPANSKY, Circuit Judges and BROWN, Senior Circuit Judge.

KRUPANSKY, Circuit Judge. The defendant-appellant, National Cash Register Corporation (NCR), appeals from a judgment, entered on a jury verdict in the Western District of Michigan, finding NCR liable to plaintiff-appellee, John W. Rose (Rose), for terminating his employment in violation of the Age Discrimination in Employment Act (ADEA or Act), 29 U.S.C. § 621 *et seq.*

A review of the record below reveals the following uncontroverted facts. Rose's employment as a salesman in NCR's Grand Rapids, Michigan office was terminated in June of 1976. Rose was 54 years of age at the time of his termination and had been employed by NCR for approximately 25 years. Rose's position was filled by a man under 30 years of age.

Rose initiated this action in the district court on January 17, 1977, asserting that he had been terminated solely on account of his age. In his case in chief, Rose relied primarily on his own testimony and that of two former NCR employees, Donald Stites and James Heubner.

This testimony disclosed that in the early 1970's NCR commenced reorganization of its sales force including a reduction in the number of sales persons. NCR instituted this reduction through a program entitled Reduction In Force (RIF). Rose's termination was recorded as a RIF.

Rose, Stites and Heubner also testified that NCR, in connection with its corporate reorganization, sought to establish a new "younger image" for the company. To achieve this new image, according to the testimony, NCR began to hire only young employees. Rose also testified that the vice-president of NCR's midwest region informed him: "Men your age, there isn't going to be any future in the new NCR."

NCR acknowledged the existence of the RIF program but denied that the program was designed to terminate older employees. Moreover, NCR maintained that Rose was terminated due to continued, substandard sales performance and that his termination was recorded as a RIF only because of his supervisor's desire to afford him the benefits available under that program. NCR introduced evidence demonstrating that Rose had continuously, through the years 1969-1975, failed to meet his sales quotas.

Rose and Heubner testified, however, that revenue quotas—the amount of money received by NCR from new and old sales—had been stressed as the company's most important measure of performance. Rose had been successful in achieving his revenue quotas.

Following several days of deliberations, the jury returned a verdict in favor of Rose. The jury awarded Rose $25,200.00 in lost wages and $20,650.00 in fringe benefits. The jury also concluded that NCR's violation of the ADEA was willful.

Thereafter, the trial court entered judgment for $45,850.00 pursuant to the jury verdict plus an equal amount in liquidated damages and awarded pre-judgment interest on the entire sum. The district court denied a subsequent defense motion for judgment notwithstanding the verdict or new trial. NCR has appealed raising several issues including two issues of first impression in this Circuit.

NCR's primary argument on appeal, however, is that Rose failed to establish a *prima facie* case of age discrimination, and this Circuit has considered that issue on several occasions. *See, Blackwell v. Sun Electric Corp.*, No. 81-5517 (6th Cir. Jan. 10, 1983); *Ackerman v. Diamond Shamrock*, 670 F.2d 66 (6th Cir. 1982); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980); *Laugesen v. Anaconda Company*, 510 F.2d 307 (6th Cir. 1975). Cf. *Locke v. Commercial Union Insurance Co.*, 676 F.2d 205 (6th Cir. 1982). In each of the foregoing cases this Court has declined to adopt rigid guidelines exclusively establishing a method for proving a *prima facie* case in age discrimination actions.

This is not to say that this Court has failed to identify the crucial elements of an ADEA action. On the contrary,

while employing slightly different formulations, this Circuit has consistently held that the ultimate burden borne by a plaintiff in an age discrimination action is that of proving "he was discharged because of his age." *Laugesen, supra* at 313. *See Blackwell, supra* slip op. at 5 (age must be a determining factor); *id.* at 22 (Krupansky, J. dissenting) (but for age);[1] *Ackerman, supra,* at 70 (age makes a difference); *Sahadi, supra* at 1117 (age a contributing factor).

There is, of course, a difference between evidence which merely establishes a *prima facie* case and that which compels a verdict for the plaintiff. *Laugeson, supra* at 312. To say that a plaintiff has established a *prima facie* case is simply to say that he has produced sufficient evidence to present his case to the jury, i.e. he has avoided a directed verdict. *See e.g. White v. Abrams,* 495 F.2d 724, 729 (4th Cir. 1974).

Evidence is sufficient to preclude granting a motion for directed verdict when, in reviewing the evidence in the light most favorable to the non-moving party, it would permit a reasonable jury to find in favor of that party. *Coffy v. Multi County Narcotics Bureau,* 600 F.2d 570, 579 (6th Cir. 1979).

Hence, a plaintiff in an ADEA action establishes a *prima facie* case by presenting evidence which, when viewed in the light most favorable to the plaintiff, would permit a reasonable jury to find that he was discharged because of his age. Contrawise, if, from "the facts presented in plaintiff's proofs there [is] simply no reasonable inference to suggest that plaintiff was discriminated against

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1. The majority and dissent in *Blackwell,* while using different terms, were in agreement as to the ultimate burden. The majority and dissent diverged in assessment of the adequacy of the instructions conveying that burden to the jury.

because of his age," *Sahadi, supra* at 1117, then plaintiff has failed to present a *prima facie* case and the trial court is required to direct a verdict for defendant.

Applying these principles to the instant matter, the Court is constrained to conclude that Rose established a *prima facie* case. Rose and two former NCR employees testified that the company wanted to promote a new, "younger image" while simultaneously reducing its work force. Moreover, Rose testified that a superior at NCR informed him that NCR held no future for a man of Rose's age. Viewed in the light most favorable to Rose, this evidence permitted the jury to conclude that Rose was a victim of the new, "younger image" at NCR.

NCR, as indicated, maintained that Rose was terminated solely because of his repeated failure to accomplish his sales objectives. The jury, however, was entitled to credit the testimony of Rose and Heubner to the effect that revenue quotas were the company's true measure of competence and thus that NCR's reliance on unachieved sales quotas as a justification for firing Rose was a pretext. This Court is not free to substitute its judgment for that of the trier of fact.

NCR next asserts that the trial court erred in awarding liquidated damages without considering, independent of the jury verdict, the purported good faith of the defendant. The ADEA recites, in pertinent part:

> Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act.

81 Stat. 604. Section 216(b) of Title 29 directs that employers who violate the Fair Labor Standards Act (FLSA) shall be liable to the aggrieved employees for "the amount of their unpaid minimum wages or their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages."

In the Portal-to-Portal Pay Act of 1947, Congress, dissatisfied with the automatic award of liquidated damages in suits under the FLSA, limited such awards as follows:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 260. In essence, NCR argues that Congress intended this section to apply in ADEA actions. This Circuit has not heretofore addressed the issue.

A review of the case authority from other Circuits reveals that only the Fifth Circuit has accepted NCR's position, *Hedrick v. Hercules, Inc.*, 658 F.2d 1088 (5th Cir. 1981); *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976), while the prevailing weight of authority is to the contrary. *Goodman v. Heublein Inc.*, 645 F.2d 127 (2d Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th

Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *See also, Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149, 154 and n.4 (7th Cir. 1981); *But See Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 and n.4 (10th Cir. 1980) (While stating that an employer's good faith renders the awards of liquidated damages discretionary, the Tenth Circuit declined to decide whether § 260 had been incorporated into the ADEA). Moreover, this Court finds that the disdiscussion of the Act by the Supreme Court in *Lorillard v. Pons*, 434 U.S. 515 (1978), relied upon by the majority of Circuits, precludes acceptance of NCR's position.

In *Lorillard v. Pons*, the Supreme Court held that a jury trial is available in private actions seeking compensatory damages under the ADEA.[2] In discussing the relationship between the ADEA and FLSA, the Supreme Court stated:

> [I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undersirable or inappropriate for incorporation. For example, in construing the enforcement sections of the FLSA, the courts had consistently declared that injunctive relief was not available in suits by private individuals but only in

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2. Several months after the decision in *Lorillard v. Pons*, the 1978 amendments of the Act took effect. Pub.L. 95-256. The amendments, *inter alia*, specifically provide for jury trials in private civil actions under the ADEA. 29 U.S.C. § 626(c)(2). In enacting this amendment, Congress not only expressed satisfaction with the Supreme Court's result in *Lorillard*, which ruled on the right to jury trial only as to compensatory damages, but also wanted to insure that parties to such actions were afforded a jury determination as to the pertinent findings—willfulness—with respect to claims for liquidated damages. H. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted* in [1978] U.S. Code. Cong. & Ad. News 528, 535. *See Goodman v. Heublein, supra* at 129-130 n.2.

> suits by the Secretary. . . . Congress made plain its decision to follow a different course in the ADEA by expressly permitting "such . . . equitable relief as may be appropriate to effectuate the purposes of [the ADEA] including without limitation judgments compelling employment, reinstatement or promotion" "in *any* action brought to enforce" the Act. § 7(b), 29 U.S.C. § 626(b) (emphasis added). Similarly, while incorporating into the ADEA the FLSA provisions authorizing awards of liquidated damages, Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful.

Id. at 582 (citations omitted). The footnote accompanying the preceding quotation is particularly instructive:

> By its terms, 29 U.S.C. § 216(b) requires that liquidated damages be awarded as a matter of right for violations of the FLSA. However, in response to its dissatisfaction with that judicial interpretation of the provision, Congress enacted the Portal-to-Portal Pay Act of 1947, 61 Stat. 84, which *inter alia*, grants courts authority to deny or limit liquidated damages where the "employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of" the FLSA § 11, 29 U.S.C. § 260 (1970 ed., Supp. V). *Although § 7(e) of the ADEA, 29 U.S.C. § 626(e), expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act, 29 U.S.C. §§ 255 and 259 (1970 ed. and Supp. V), the ADEA does not make any reference to §§ 11, 29 U.S.C. § 260 (1970 ed., Supp. V).*

Id. at n.8 (emphasis added)

The Supreme Court's discussion clearly demonstrates how Congress selectively and *expressly* incorporated provisions of the FLSA and the Portal-to-Portal Pay Act into the ADEA as it deemed fit for that purpose. There is simply no basis for this Court to disturb this legislative scheme by arbitrarily inserting into the ADEA a provision which Congress did not mention.

NCR would emphasize that the ADEA incorporates, for purposes of assessing damages, "sections 16 and 17 of the Fair Labor Standards Act, of 1938, *as amended*." 81 Stat. 604 (emphasis added).[3] NCR asserts that the words "as amended" were utilized by Congress to refer to § 260. A common sense construction of the section, however, indicates that the words "as amended" merely refer to internal amendments of §§ 16 and 17, of which there have been several, *see e.g.* Pub. L. 87-30, Act Oct. 26, 1945, Act May 14, 1947, rather than separate provisions of Title 29 which simply have an effect on the operation of §§ 16 and 17.

This Court is thus persuaded that the prevailing weight of authority is correct and we join those Circuits in holding that 29 U.S.C. § 260 is not applicable to actions instituted

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3. The codification of this provision, which has not been enacted into positive law, reads as follows:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title.

29 U.S.C. § 626(b). The codification has deleted the words "as amended" upon which NCR relies. A codification which has not been enacted into positive law is merely "prima facie the law[ ] of the United States" and the Statutes at Large prevail in the case of inconsistency. 1 U.S.C. § 204(a); *United States v. Welden*, 377 U.S. 95 (1964).

The Court has therefore referred to the provision of the Act as it appears in the Statutes at Large. However, for the reasons stated in the text, the inconsistency is of no assistance to NCR's position.

pursuant to the ADEA. Accordingly, where, as here, the jury determines that an employer's violation of the ADEA was willful, the trial judge is not obligated, as a prerequisite to an award of liquidated damages, to consider the employer's protestations of good faith.

NCR also challenges the propriety of the district court's award of pre-judgment interest in addition to liquidated damages. This issue has also not been resolved in this Circuit.

NCR properly observes that the Supreme Court held in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), that an employee is not entitled to both full liquidated damages and pre-judgment interest under § 16 of the FLSA. Inasmuch as Congress incorporated the remedies of the FLSA into the ADEA and, since "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law" *Lorillard v. Pons, supra* at 582, this Court is of the opinion that the rule of *Brooklyn Savings Bank*, is applicable to ADEA actions. *See Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981). This action must therefore be remanded to the district court for vacation of the award of pre-judgment interest.

Finally, the award of attorney's fees, which was determined by simply granting an amount equal to one-third of the damages awarded, was also improper and must be remanded for computation in accordance with the principles enunciated in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), and its progeny.

In accordance with the foregoing, the instant matter is affirmed in part, reversed in part and remanded to the district court for action consistent with this decision.

APPENDIX B

(Filed March 31, 1983)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1245

JOHN W. ROSE,
Plaintiff-Appellee,

vs.

THE NATIONAL CASH REGISTER CORPORATION,
Defendant-Appellant.

Before: MARTIN and KRUPANSKY, Circuit Judges and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, reversed in part and remanded for action consistent with the opinion of this Court.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

Issued as Mandate: JUNE 13, 1983

A True Copy.

Attest:

/s/ Linda L. Brinson
Deputy Clerk

APPENDIX C

(Filed June 3, 1983)

No. 81-1245

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN W. ROSE,
Plaintiff-Appellee

v.

NATIONAL CASH REGISTER CORPORATION,
Defendant-Appellant

ORDER

BEFORE: MARTIN, KRUPANSKY, Circuit Judges, and BROWN, Senior Circuit Judge.

This matter is before the Court on the motion of appellant for a rehearing. Upon due consideration, the Court determines that rehearing is unwarranted and appellant's motion must be, and hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

(Filed November 18, 1980)

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. G77-33 CA1

JOHN W. ROSE,
Plaintiff,

-vs-

NATIONAL CASH REGISTER CORPORATION,
Defendant.

JUDGMENT

At a session of said Court held in the aforesaid District and Division, Federal Building, City of Grand Rapids, State of Michigan, this 18th day of November, 1980,

PRESENT: HON. DOUGLAS W. HILLMAN
District Judge

This action having come on for trial before the court and a jury, Honorable Douglas W. Hillman, United States District Judge, presiding, and the issues having been duly tried, the jury having rendered a verdict on certain issues, and the court having rendered judgment on certain other issues; now, therefore, for good cause shown,

IT IS HEREBY ORDERED, pursuant to the verdict entered by the jury, that plaintiff, John W. Rose, recover of defendant, National Cash Register Corporation, Twenty-five Thousand Two Hundred Dollars ($25,200.00) in lost wages, and Twenty Thousand Six Hundred Fifty Dollars ($20,650.00) in lost fringe benefits, together with interest thereon as provided by law;

IT IS FURTHER ORDERED, pursuant to 29 U.S.C. §§ 626(b) and 216(b), plaintiff recover of defendant Forty-five Thousand Eight Hundred Fifty Dollars ($45,-850.00) as liquidated damages, together with interest thereon as provided by law;

IT IS FURTHER ORDERED, pursuant to 29 U.S.C. § 216(b), plaintiff recover such costs and attorney fees as may be awarded.

/s/ Douglas W. Hillman
Douglas W. Hillman
District Judge

APPENDIX E

(Filed April 3, 1981)

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. G-77-33-CA 1

JOHN W. ROSE,
Plaintiff,

vs.

NATIONAL CASH REGISTER CORP.
Defendant.

ORDER

At a session of said Court, held in the Federal District Court, Southern Division, Federal Building, City of Grand Rapids, County of Kent, State of Michigan, on this 3rd day of April, 1981.

PRESENT: Hon. Douglas W. Hillman
District Judge

This action having come on for trial before the court and a jury, Honorable Douglas W. Hillman, United States District Judge presiding, and the issues having been duly tried and a jury having rendered a verdict on certain issues, and the court having rendered judgment on certain other issues and the court having reviewed the file and memorandums of law, having heard the motions, now, therefore, for good cause shown, and the court being fully advised in the premises:

IT IS HEREBY ORDERED, Defendant's Motion for Judgment Notwithstanding Verdict is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant's Motion for a New Trial is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for Post-Judgment Damages is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for Interest on the Judgment is granted, and interest at the statutory rate in the amount of $26,304.14 shall be added to the previous Judgment. This interest is computed as of February 13, 1981.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for Costs is hereby granted and costs in the amount of $3,821.53 will be awarded to Plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion for attorney fees is granted in the amount of one-third (1/3) of the Judgment, in an amount of $39,295.38 [($91,700.00 + 26,304.14) x 33.3%].

IT IS FURTHER ORDERED AND ADJUDGED that the total amount due the Plaintiff by the Defendant is $161,121.05.

/s/ Douglas W. Hillman
Honorable Douglas W. Hillman
District Court Judge

APPENDIX F

Age Discrimination in Employment Act of 1967 § 7(b), 81 Stat. 604

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

APPENDIX G

Age Discrimination in Employment Act
§ 7(b), 29 U.S.C. § 626(b)

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

APPENDIX H

Portal-to-Portal Act of 1947
§ 11, 29 U.S.C. § 260

In any action commenced prior to or on after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

APPENDIX I

Fair Labor Standards Act of 1938 § 16(b), 29 U.S.C. § 216(b)

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum

wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.